Supreme Court, U.S.
FILED

110

08-590 OCT 29 2008

No. ——— OFFICE OF THE CLERK

In The
Supreme Court of the United States

DEAN A. SINIBALDI,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

DOUGLAS A. TRANT
Counsel of Record
900 S. GAY STREET
SUITE 1502 RIVERVIEW TOWER
KNOXVILLE, TN 37902
(865) 525-9780

Counsel for Petitioner

October 29, 2008

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED FOR REVIEW

1. Should the jury have been instructed that an element of fraud is that of materiality, that is, a material fact or matter is one that has a natural tendency to influence or be capable of influencing a person's decision? Any misrepresentation or concealment must be reasonably calculated to deceive persons of ordinary prudence and comprehension.

2. Should failure to instruct the jury that materiality is defined by persons of ordinary prudence be analyzed under plain error or harmless error.

3. Should the indictment be dismissed for failure to include the element of materiality within it?

4. Should this Court grant Certiorari to clarify its holding in U.S. v. Santos, 128 S. Ct. 2020, 170 L. Ed. 2d 912 (2007) because lower courts are interpreting the holding differently?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Eleventh Circuit were:

Gene A. Tyrrell, Appellant
Dean A. Sinibaldi, Appellant
Joseph Cuciniello, Appellant
United States of America, Appellee

TABLES OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

TABLES OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED 1

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 7

REASONS FOR GRANTING THE PETITION .. 10

1. Should the jury have been instructed that an element of fraud is that of materiality, that is, a material fact or matter is one that has a natural tendency to influence or be capable of influencing a person's decision? Any misrepresentation or concealment must be reasonably calculated to deceive persons of ordinary prudence and comprehension. 10

2. Should failure to instruct the jury that materiality is defined by persons of ordinary prudence be analyzed under plain error or harmless error. 13

3. Should the indictment be dismissed for failure to include the element of materiality within it? 15

4. Should this Court grant Certiorari to clarify its holding in U.S. v. Santos, 128 S. Ct. 2020, 170 L. Ed. 2d 912 (2007) because lower courts are interpreting the holding differently? 16

CONCLUSION 18

APPENDIX:

Appendix A: Eleventh Circuit decision (March 17, 2008) 1a

Appendix B: Eleventh Circuit decision regarding rehearing (July 30, 2008) 27a

Appendix C: Statutes 29a

TABLE OF AUTHORITIES

Cases

Apprendi v. New Jersey,
530 U.S. 466, 120 S. Ct. 2348, L. Ed. 2d 435 (2000) 13

Associates & Adolescent Psychiatry, S.C. v. Home Life Insurance Company,
941 F.2d 561 (7th Cir. 1991) 11

Blakely v. Washington,
542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed. 2d 403, (2004) 13

Blount Financial Services, Inc. v. Walker E. Heller & Co.,
819 F.2d 151 (6th. Cir. 1987) 11

Cunningham v. California,
549 U.S. 270, 127 S.Ct. 856,
166 L.Ed.2d 856 13

Freeze v. State,
827 N.E.2d 600 (2005) 14

Griffin v. Kentucky,
93 L. Ed. 2d 649 (1987) 17

Lemon v. United States,
278 F.2d 369 (9th Cir. 1960) 10

Neder v. United States,
527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) 13, 14, 15

Russell v. U.S.,
369 U.S. 749, 82 S. Ct. 1038, 8 L. Ed. 2d 240 (1962) 15

Schriro v. Summerlin,
542 U.S. 348, 124 S. Ct. 2519 (2004) 17

Teague v. Lane,
489 U.S. 288, 109 S. Ct 1060 (1989) 17

U.S. v. Avery,
295 F.3d 1158 (2002) 15

U.S. v. Beitscher,
467 F.2d 269 (10th Cir. 1972) 10

U.S. v. Brien,
617 F.2d 299(1st Cir. 1980) 10

U.S. v. Brown,
79 F.3d 1550 (11th Cir. 1996) 10

U.S. v. Cochran,
109 F.3d 660 (10th Cir. 1997) 10

U.S. v. Daniels,
973 F.2d 272 (4th Cir. 1992) 15

U.S. v. Du Bo,
186 F.3d 1177 (9th Cir. 1999) 15

U.S. v. Faukowitz,
214 F.2d 365 (SDNY 2002) 10, 11

U.S. v. Fleming,
2008 WL 3824752 16

U.S. v. Forbes,
16 F.3d 1294 (1st Cir. 1994) 15

U.S. v. Frost,
125 F.3d 346 (6th Cir. 1997) 11

U.S. v. Helund,
2008 WL 4183958 16

U.S. v. Hooker,
841 F.2d 1225 (4th Cir. 1988) 15

U.S. v. Maxwell,
920 F.2d 1028 (D.C. Cir. 1990) 10

U.S. v. Mojica-Baez,
229 F.3d 292 (1st Cir. 2000) 15

U.S. v. Netterville,
553 F.2d 903 (5th Cir. 1997) 10

U. S. v. Orosco,
___ F.2d ___, 2008 WL 4194878 16

U.S. v. Prentiss,
207 F.2d 960 (10th Cir. 2000) 15

U.S. v. Santos,
128 S. Ct. 2020, 170 L. Ed. 2d 912 (2007) . 16, 17

U.S. v. Spinner,
180 F.3d 514 (3rd Cir. 1992) 15

U.S. v. Svete,
521 F.3d 1302 (11th Cir. 2008) 13

U.S. v. Thompson,
2008 WL 2514090 (E.D. Tenn.) 16

U.S. v. Yusuf,
536 F.3d 178 16

Statutes

15 U.S.C. § 77E(a) 1

15 U.S.C. § 78J(b) 1

18 U.S.C. § 1341 1

18 U.S.C. § 1956 16

18 U.S.C. § 1956(a)(1)(A)(i) 1

18 U.S.C. § 1957 1

18 U.S.C. § 371 1

28 U.S.C. § 1254 1

Other Authorities

Zingale, *Fashioning a Victim Standard by Mail and Wire Fraud: Ordinary Prudent Person or Monumentally Credulous Goal?*, 99 Columbia Law Review 795 (1999) 10

OPINIONS BELOW

The Eleventh Circuit in an unpublished opinion on March 17, 2008, affirmed the convictions. In an also unpublished opinion on July 30, 2008 the petition for rehearing was also denied. These opinions are located in the Appendix.

JURISDICTION

The petition for rehearing was denied on July 30, 2008. This Court has jurisdiction under 28 U.S.C. § 1254.

STATUTES INVOLVED

18 U.S.C. § 371, 15 U.S.C. § 78J(b), 15 U.S.C. § 77E(a), 18 U.S.C. § 1341, 18 U.S.C. § 1957, 18 U.S.C. § 1956(a)(1)(A)(i).

STATEMENT OF THE CASE

1. The Appellant, DEAN A. SINIBALDI, was indicted on December 10, 2002 (Doc. #32).

2. Mr. Sinibaldi was arrested on December 17, 2002 (Doc # 17). On the same day an Initial Appearance was held by Judge Jenkins (Doc # 51) and a $50,000 non-surety bond was set (Doc #52).

3. On January 15, 2003, Mr. Sinibaldi was Arraigned before Judge Pizzo and a not guilty plea was entered. (Doc# 92).

4. On November 16, 2004, a Second Superseding Indictment was filed (Doc# 577).

5. On January 21, 2005, a Bill of Particulars was filed by the Government (Doc. # 644)

6. On January 26, 2005 Mr. Sinibaldi filed a Motion to Continue Trial (Doc. # 647), which was denied by the Court on February 2, 2005 (Doc. # 662) as well as a Motion to Strike F.R.C.P. 404(b) Evidence (Doc # 648) which the Government responded to on February 6, 2005 (Doc. # 697) and the Court denied on February 8, 2005 (Doc. # 708).

7. On January 31, 2005, Mr. Sinibaldi filed a Motion in Limine to preclude evidence of prior bad acts, which the Court denied on February 8, 2005 (Doc. # 708), and an Emergency Motion for Depositions (Doc. # 657) which was granted by the Court on February 2, 2005 (Doc. # 663).

8. On February 4, 2005, the Government filed a Second Bill of Particulars (Doc # 66) as well as Notices of Lis Pendens against Mr. Sinibaldi's property (Doc #'s 670-685).

9. On February 7, 2005,the Government filed First Addendum to the Second Bill of Particulars (Doc # 705)

10. On February 7, 2005, Jury selection commenced (Doc. # 707).

11. On February 16, 2005, Mr. Sinibaldi filed an objection to the Government's Motion in Limine

(Doc. # 754 regarding Doc. #738) which the Court denied on February 24, 2005 (Doc. # 788).

12. On February 17, 2005, Mr. Sinibaldi filed a Motion to Limit Expert Legal Opinion (Doc #. 765) which the Court denied on (February 24, 2005 (Doc. # 789).

13. On February 18, 2005, the Government filed a Motion for Permission for the Expert and Summary Witnesses to Observe Portion of the Trial (Doc. # 766).

14. Again on February 18, 2005, the Government filed. additional Lis Pendens against Mr. Sinibaldi's property (Doc #'s 770-772).

15. On February 22, 2005, the Appellant moved for mistrial because of the trial Courts allowance of Government witnesses Stutts and Janicus to observe testimony after the sequestration rule was invoked. (Doc. # 778) and also because the Mayor of San Lorenzo would be allowed to testify to issues he had no personal knowledge of (Doc. # 780), both of which were denied (Doc #'s 779 and 781 respectively)

16. On February 23, 2005, the Appellant moved for a mistrial because witness Stutts was present during other witness' testimony (Doc.# 784) which the Trial Court denied (Doc. # 785).

17. On February 25, 2005, Mr. Sinibaldi filed a Motion for Disclosure of Material Relevant to Expert Testimony Pursuant to Rule 703(Doc #

795) which the Trial Court denied as moot on April 26, 2005. (Doc # 982).

18. On February 28, 2005, the Appellant moved for mistrial because Agent Nance testified to details of the State of Florida investigation of another security not related to the instant case (Doc. # 802) which the Trial Court denied (Doc # 803).

19. On March 1, 2005, Mr. Sinibaldi again moved for mistrial because witness Lavis testified to the fact that she had to take out a loan implicitly because of the MIT investment loss (Doc.# 805) which the Court denied (Doc. # 806).

20. On March 8, 2005, the Government filed a Trial Brief concerning the admission of receivers reports and business records into evidence (Doc # 816). In response, Mr. Sinibaldi filed an objection on March 13, 2005 (Doc. #. 825).

21. On March 15, 2005, Mr. Sinibaldi declared an oral motion for severance of Co-Defendant Schultz (Doc. # 832) which the Trial Court denied without prejudice (Doc. # 833), and immediately following Mr. Sinibaldi moved for mistrial (Doc. # 834) which the Court also denied (Doc. # 835).

22. Again on March 16, 2005, the Appellant moved for severance of Co-Defendant Schultz (Doc. # 843) which the Court granted (Doc. # 844).

23. On March 17, 2005, Mr. Sinibaldi declared an oral motion to redact the state court documents

to avoid prejudice during Mr. Lipson's testimony, (Doc. # 857) which the Court denied (Doc. # 858). Mr. Sinibaldi subsequently declared a motion for mistrial (Doc. #859) which the Court also denied (Doc. # 860).

24. On March 29, 2005, the Appellant declared an oral motion for severance (Doc. # 886) which the Court denied (Doc. # 887).

25. On that same day, Mr. Sinibaldi moved to strike the testimony of Hilda Burgi because the Government asked her to authenticate a check that she had never seen (Doc. # 888) which the Court denied (Doc. # 889).

26. Also, Mr. Sinibaldi moved to Dismiss the Indictment (Doc. # 890) which the Court denied (Doc. # 891) and Mr. Sinibaldi immediately moved for mistrial (Doc. # 892) which the Court also denied (Doc. # 893).

27. On March 29, 2005, the Appellant moved for mistrial (Doc. # 902) which the Court denied (Doc. # 903).

28. On April 1, 2005, Mr. Sinibaldi filed his Proposed Jury Instructions with the Court (Doc. # 917)

29. On April 3, 2005, the Government filed a response to the Trial Courts accelerated time line for trial (Doc. # 920).

30. On April 4, 2005, the Appellant made an oral motion to continue (Doc.# 922) which the Court

denied (Doc. # 923) and then moved for a motion for mistrial (Doc. # 924), which the Court also denied (Doc. # 925).

31. On April 11, 2005, Mr. Sinibaldi filed a 17 page Motion for Judgment of Acquittal Doc. # 939) which the Court granted in part and denied in part on April 18, 2005 (Doc. # 958).

32. On April 12, 2005, the Appellant filed a Motion for Reconsideration to Strike Government's Exhibit 31A-4 (Doc. # 947).

33. On April 15, 2005, the Appellant filed a Memorandum concerning the testimony of Attorney Murray Silverstein (Doc. # 954).

34. On April 17, 2005, Mr Sinibaldi filed additional proposed jury instructions with the Court (Doc. # 956).

35. On April 18, 2005, Mr. Sinibaldi declared an oral order for mistrial (Doc. # 960) which the Court denied (Doc. # 961).

36. On April 20, 2005, the Appellant moved for a motion for mistrial (Doc. # 969) which the Court denied (Doc. # 970).

37. On April 21, 2005, the Jury returned a verdict as to Mr. Sinibaldi declaring him not guilty on counts 5, 14-20, and 22 and guilty as to counts 1-3, 7-13, and 23-38. (Doc. # 980).

38. On April 25, 2005, Mr. Sinibaldi filed a Motion to Extend the Time Allotted for Filing the

Motion for New Trial to 30 days (Doc. # 985) which the Court granted (Doc. # 986).

39. On May 10, 2005, the Appellant filed a Motion for Reconsideration of his previously filed Motion for Judgment of Acquittal. (Doc. # 1004) and a Motion for New Trial (Doc. # 1005), both of which the Court denied (Doc.# 1068 and 1069 respectively).

40. On August 3, 2005, Mr. Sinibaldi filed a Motion for Bond Pending Appeal (Doc. # 1102) which was denied by the Court on August 12, 2005 (Doc. # 1115).

41. On August 12, 2005, Mr. Sinibaldi was sentenced to168 months incarceration, followed by 36 months of supervised release and restitution in the amount of $5,333,334 (Doc. # 1116).

42. On August 16, 2005, the Judgment was filed as to Mr. Sinibaldi (Doc. # 1121) and Mr. Sinibaldi filed his Notice of Appeal (Doc. # 1122).

43. The Eleventh Circuit affirmed the conviction in an unpublished opinion on March 17, 2008.

44. The Eleventh Circuit denied the petition for rehearing on July 30, 2008.

STATEMENT OF FACTS

Dean A. Sinibaldi is a licensed real estate and insurance salesman in the State of Florida. In 1984 Mr. Sinibaldi received his Florida insurance license

and began selling insurance products. In 1996 Mr. Sinibaldi started a company called Delta Financial in Fort Myers, Florida which provided various insurance services. Mr. Sinibaldi became a well known and successful member of the community. On September 19, 1996, Greg Schultz and Danny Way began the Millennium Investment Trust (MIT). (Doc. # 1201, P. 29). During the fall of 1997, Greg Schultz approached Dean Sinibaldi and provided him information regarding MIT. Mr. Schultz informed Mr. Sinibaldi that he was a securities attorney and that he was a former securities administrative law judge from Michigan. (Doc. # 1201, P. 29). Mr. Schultz also told Mr. Sinibaldi that the MIT product invested in up-and-coming companies that were going to go public, or had recently done so, and that Mr. Schultz had obtained a Bankers Acceptance from the Bank of Bermuda that guaranteed the investor's principle in case of a default. (Doc. # 1201, P. 32). Furthermore, Mr. Schultz informed Mr. Sinibaldi that the MIT product was exempt from registration with the State of Florida and the SEC. (Doc. # 1201, P. 28).

After Mr. Schultz explained the high points of the MIT Investment, he asked Mr. Sinibaldi to market the MIT product and included Mr. Sinibaldi as a member of the Executive Committee. (Doc. # 1201, P. 30). Before Mr. Sinibaldi entertained the offer he visited the underlying investments of MIT and discovered that they indeed existed and appeared to be flourishing. (Exhibit 31B, p 30-36)

Meanwhile, in mid 1998, Greg Schultz joined forces with Joseph Cuciniello and began another investment product which they named StoneHedge Group, Inc. (SHG) (Doc. # 1201, P. 34). Subsequently, a State of

Florida investigation began against SHG followed by an investigation against MIT. (Doc. # 1201, P. 40). It should be noted that Mr. Sinibaldi's last sale was in July of 1999, before the filing of the Motion for Temporary Injunction Order. By the culmination of the investigation which was the Filing of a Temporary Injunction Order on October 27, 1999. Mr. Sinibaldi had disassociated with MIT. (Doc. # 1201, P. 41).

From April of 1997 until October 27, 1999, when the State of Florida received a Temporary Injunction Order against MIT, Mr. Sinibaldi marketed only the MIT Investment based on the selling points in the prospectus provided to him by Mr. Schultz and neither participated nor interacted with the SHG group or their product. (Doc. # 1201, P. 42) . During this time, Mr. Sinibaldi was advised by some of his clients that they had not received their interest checks from MIT. In response Mr. Sinibaldi contacted Mr. Schultz to complain and was informed by Mr. Wey that the interest checks were going to be late due to the lack of liquidity. (Doc. # 1217, P. 106) In response, Mr. Sinibaldi issued checks for the interest amount owed to his clients from his company, Delta Financial, and from his personal account with the understanding that MIT would reimburse him. (Doc. # 1201, P. 85; Doc.# 1217, P 107). Furthermore, after Mr. Sinibaldi was informed of the liquidity problem, he agreed to accept stock in the underlying companies of the MIT investment as opposed to a paycheck. (Doc. # 1217, P. 124). In July of 1999 Mr. Sinibaldi became aware of trouble with MIT. On October 27, 1999, Mr. Sinibaldi was informed of the Temporary Injunction against MIT and ceased marketing the MIT product. (Doc. # 1201, P. 42, 87).

REASONS FOR GRANTING THE PETITION

1. **Should the jury have been instructed that an element of fraud is that of materiality, that is, a material fact or matter is one that has a natural tendency to influence or be capable of influencing a person's decision? Any misrepresentation or concealment must be reasonably calculated to deceive persons of ordinary prudence and comprehension.**

A circuit split exists as to whether misrepresentation or concealment must be reasonably calculated to deceive persons of ordinary prudence and comprehension or where the most gullible persons would be deceived. The Eleventh Circuit in U.S. v. Brown, 79 F.3d 1550 (11th Cir. 1996), adopted the objective standard of a person of ordinary prudence or comprehension. The objective standard is not tied directly to the experiences of a specific person or persons. The Tenth Circuit in U.S. v. Cochran, 109 F.3d 660 (10th Cir. 1997), held that the objective reference to persons of ordinary prudence or comprehension assists in determining whether the accused's conduct was calculated to deceive. U.S. v. Faukowitz, 214 F.2d 365 (SDNY 2002); U.S. v. Netterville, 553 F.2d 903 (5th Cir. 1997); U.S. v. Beitscher, 467 F.2d 269 (10th Cir. 1972).

Two other circuits have used the most gullible person standard. U.S. v. Brien, 617 F.2d 299 (1st Cir. 1980); U.S. v. Maxwell, 920 F.2d 1028 (D.C. Cir. 1990); Lemon v. United States, 278 F.2d 369 (9th Cir. 1960). An excellent law review article also discusses the two different standards. Zingale, *Fashioning a Victim Standard by Mail and Wire Fraud: Ordinary Prudent*

Person or Monumentally Credulous Goal?, 99 Columbia Law Review 795 (1999).

The Sixth Circuit has not answered the question directly but has approved an objective standard. U.S. v. Frost, 125 F.3d 346 (6th Cir. 1997). The Sixth Circuit in Blount Financial Services, Inc. v. Walker E. Heller & Co., 819 F.2d 151 (6th. Cir. 1987) held that an objective standard should be used. The Seventh Circuit in Associates & Adolescent Psychiatry, S.C. v. Home Life Insurance Company, 941 F.2d 561 (7th Cir. 1991) adopted the persons of ordinary prudence standard. As noted in U.S. v. Falkowitz, 214 F.2d 365 (SDNY) there is "apparent disarray" even within the circuits. *Id. At 377.* As Judge Marrero stated:

> The Ninth Circuit's ruling in *Ciccone* adopted the lower threshold that it is immaterial whether only the most gullible could have been deceived. 219 F.3d at 1083 (citing *United States v. Hanley,* 190 F.3d 1017, 1023 (9th Cir.1999) and *Lemon v. United States,* 278 F.2d 369, 373 (9th Cir.1960)). At the same time, that court acknowledged, without specifically overruling, earlier precedents that endorse the standard requiring that a scheme to defraud be reasonably calculated to deceive persons of ordinary prudence and comprehension. *See id.* (citing *United States v. Bohonus,* 628 F.2d 1167, 1172 (9th Cir.1980), *United States v. Mason,* 902 F.2d 1434, 1442 (9th Cir.1990) and *United States v. Green,* 745 F.2d 1205, 1209 (9th Cir.1984)). A similar ambiguity as to the applicable test is manifest in still extant precedents in other circuits. *Compare United States v. Brandon,* 17 F.3d 409, 425 (1st

Cir.1994), with *Brien,* 617 F.2d at 311; *Davis,* 226 F.3d at 358-59, with *United States v. Netterville,* 553 F.2d 903, 908 (5th Cir.), *cert. denied,* 434 U.S. 861, 98 S.Ct. 189, 54 L.Ed.2d 135 (1977); *United States v. Van Dyke,* 605 F.2d 220, 225 (6th Cir.), *cert. denied,* 444 U.S. 994, 100 S.Ct. 529, 62 L.Ed.2d 425 (1979) with *Bogy v. United States,* 96 F.2d 734, 741 (6th Cir.), *cert. denied,* 305 U.S. 608, 59 S.Ct. 68, 83 L.Ed. 387 (1938); *Spiegel v. Cont'l Ill. Nat'l Bank,* 790 F.2d 638, 646 (7th Cir.1986), with *United States v. Coffman,* 94 F.3d 330, 333-34 (7th Cir.1996); *Rudd v. United States,* 173 F. 912, 913-914 (8th Cir.1909), with *Goodman,* 984 F.2d at 235.

The *Coffman* court, noting the apparent internal and inter-circuit conflicts in the standards articulated by various Courts of Appeals, expressed doubt that there is real inconsistency in these rulings. Endeavoring to reconcile the discrepancies, the court postulated that the "reasonable person" language cited by some courts was employed not as a reference to the intended victims of fraud but "to guide the jury in evaluating circumstantial evidence of fraudulent intent: that the defendants' scheme was calculated to deceive a person of ordinary prudence is some evidence that it was intended to deceive" and to "gesture [ ], although clumsily, toward the indistinct border zone between real fraud and sharp dealing." *Id.* This explanation, however, does not satisfactorily account for the evidentiary requirement imposed by a ruling such as *Brown,* where the court elevated the "reasonable person" test to a distinct element of the offense that the

government must establish with sufficient proof. *See Brown,* 79 F.3d at 1558 ("Federal criminal fraud requires proof that a person of ordinary prudence would rely on a representation or deception"). *Id at 378.*

This Court in Neder v. United States. 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999), held that materiality of falsehood is an element of federal mail fraud, wire fraud and bank fraud statutes. The standard to be applied under the definition of materiality should, therefore, be included in any jury instruction. The Eleventh Circuit is now *en banc* considering the issue of omitting the requirement of ordinary prudence constitutes reversible error. U.S. v. Svete, 521 F.3d 1302 (11th Cir. 2008), *en banc* review has been granted.

2. Should failure to instruct the jury that materiality is defined by persons of ordinary prudence be analyzed under plain error or harmless error.

This Court in Neder v. United States, 527 U.S. 1, 119 Sup. Ct. 1827, 144 L. Ed. 2d 35 (1999), held that faulty jury instruction omitting an element should be analyzed under the harmless error standard. The Petitioner asks the Court to reconsider its harmless error ruling in Neder because of the developing Sixth Amendment case law requiring a jury finding of facts since that time. Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, L. Ed. 2d 435 (2000); Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed. 2d 403, (2004); Cunningham v. California, 549 U.S. 270, 127 S.Ct. 856, 166 L.Ed.2d 856.

Judge Barnes of the Indiana Court of Appeals in Freeze v. State, 827 N.E.2d 600 (2005) questioned the continued validity of Neder. The Court held:

> We believe the validity of *Neder* might be short-lived, in light of the seismic shift in the Supreme Court's Sixth Amendment jurisprudence since 1999. Specifically, Justice Scalia wrote a vigorous dissent in *Neder,* joined in part by Justice Stevens and fully by Justices Ginsburg and Souter-in other words, four of the five members of the *Blakely* majority. Justice Thomas, the fifth *Blakely* justice, was in the *Neder* majority. After *Neder,* and beginning at least with *Apprendi,* he has repudiated a narrow interpretation of the Sixth Amendment jury trial right and has joined Justice Scalia's broad view of it. *See also Shepard v. United States,* 544U.S. 13, 125 S.Ct. 1254, 1264, 161 L.Ed.2d 205 (Thomas, J., concurring) (disavowing his concurring vote in *Almendarez-Torres v. United States,* 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), a five-four Sixth Amendment decision upon which criminal history "exception" to *Apprendi- Blakely* rule is based). Additionally, *Neder* itself cautions that "safeguarding the jury guarantee will often require that a reviewing court conduct a thorough examination of the record. If, at the end of that examination, the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error ... it should not find the error harmless." *Neder,* 527 U.S. at 19, 119 S.Ct. at 1838. *Id at 605-606.*

3. Should the indictment be dismissed for failure to include the element of materiality within it?

The indictment in this case did not include the element of materiality or a definition thereof. The petitioner would argue that this constituted plain error. A number of circuits undertaking a Fifth Amendment analysis of a failure to include an element in an indictment as plain error. Even if this Court were to continue to hold that the failure to submit an element of an offense to a petit jury is subject to harmless error analysis, because it is simply an error in the trial process itself not applied to errors in the grand jury indictment. The Neder rule should not apply to grand jury jurisprudence because we cannot guess as to what was in the minds of the grand jury at the time of the indictment. U.S. v. Prentiss, 207 F.2d 960 (10th Cir. 2000); U.S. v. Du Bo, 186 F.3d 1177 (9th Cir. 1999); Russell v. U.S., 369 U.S. 749, 82 S. Ct. 1038, 8 L. Ed. 2d 240 (1962); U.S. v. Daniels, 973 F.2d 272 (4th Cir. 1992); U.S. v. Spinner, 180 F.3d 514 (3rd Cir. 1992); U.S. v. Hooker, 841 F.2d 1225 (Ca4 1988).

A plain error analysis should be used in determining whether a violation of a grand jury right under the Fifth Amendment should be reversed. U.S. v. Mojica-Baez, 229 F.3d 292 (1st Cir. 2000); U.S. v. Avery, 295 F.3d 1158 (2002). The objection to the indictment may be raised for the first time on appeal. U.S. v. Forbes, 16 F.3d 1294 (1st Cir. 1994)

4. Should this Court grant Certiorari to clarify its holding in U.S. v. Santos, 128 S. Ct. 2020, 170 L. Ed. 2d 912 (2007) because lower courts are interpreting the holding differently?

The Third Circuit in U.S. v. Yusuf, 536 F.3d 178 agreed with the plurality of this Court in Santos. In U. S. v. Orosco, ___ F.2d ___, 2008 WL 4194878 (D. Col.) held that this Court only applied Santos to proceeds from an illegal gambling activity. The Third Circuit in U.S. v. Fleming, 2008 WL 3824752 (3rd Cir. (Virgin Islands)) held that the following in Santos applies only to proceeds in an illegal gambling operation.

The District Court in the Northern District of California held in U.S. v Helund, 2008 WL 4183958 (N.D. Cal) that Santos does apply to any proceeds of a money laundering activity. Senior District Judge Leon Jordan of the District Court of the Eastern District of Tennessee in U.S. v Thompson, 2008 WL 2514090 (E.D. Tenn.) agreed and held that proceeds applies to money laundering offenses under 18 U.S.C. § 1956.

The defendant attempted to raise the proceeds issue decided by U.S. v. Santos in an amended motion for rehearing or in the alternative to file a supplemental brief pursuant to U.S. v. Santos in the Eleventh Circuit. The Eleventh Circuit denied the motion for rehearing because it held that circuit law prevents new issues being raised in a motion for rehearing. There is absolutely nothing in the record that suggests the government prosecuted the defendant for, or that he was convicted of, of laundering "proceeds" as defined by this Court as profits. Justice Scalia held in Santos that rule of

lenity applies, and the defendant should be granted a new trial. The evidence put forth by the government only showed that the defendant conducted "expense" based transactions. The theory of the government was that the clients of the defendant made checks payable to Millennium Investments, Inc. which he turned directly over to this corporation. Millennium Investments, Inc. then paid commissions to the defendant which constituted gross receipts of the company. He paid expenses from those gross receipts including rent, phone, electric and sales commissions. The defendant is still on direct review and should be permitted to raise this issue. Griffin v. Kentucky, 93 L. Ed. 2d 649 (1987).

In addition, the petitioner submits that the holding in Santos constitutes a new rule. His trial and appellate counsel could not have anticipated that Santos would have defined proceeds as it did. Consequently, Santos should be applied to this case because it is still on direct review. Schriro v. Summerlin, 542 U.S. 348, 124 S. Ct. 2519 (2004).

A case announces a new rule when it breaks new ground or imposes a new obligation on the states or the federal government. Teague v. Lane, 489 U.S. 288, 109 S. Ct 1060 (1989).

CONCLUSION

The appellant, Dean A. Sinibaldi urges this Court to accept this Petition for a Writ of Certiorari to the Eleventh Circuit.

DOUGLAS A. TRANT
Counsel of Record
900 S. Gay Street
Suite 1502 Riverview Tower
Knoxville, TN 37902
(865) 525-9780

October 29, 2008